1980

Clarice Dupuis v. Edwin Cyrill Nielson : Appellant'S Brief

Utah Supreme Court

JAMES F. Hawks; Attorney for Appellant Frank N. Karras; Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

CLARICE DUPUIS,)

Plaintiff-Appellant,)

vs.) Case No. 16865

EDWIN CYRILL NIELSON,)

Defendant-Respondent.)

APPELLANT'S BRIEF

APPEAL FROM VERDICT AND JUDGMENT
OF THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, HONORABLE
ERNEST F. BALDWIN, JR., JUDGE

JAMES E. HAWKES
301 Gump & Ayers Building
2120 South 1300 East
Salt Lake City, Utah 84106

Attorney for Appellant.

FRANK N. KARRAS
321 South 6th East
Salt Lake City, Utah 84102

Attorney for Respondent.

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2120 South 1300 East
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Attorney for Appellant.

FRANK N. KARRAS
321 South 6th East
Salt Lake City, Utah 84102

Attorney for Respondent.

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STATEMENT OF THE CASE

Plaintiff-appellant was injured while stopped in her car at a red light by defendant-respondent's truck crashing into her vehicle from the rear.

DISPOSITION OF THE CASE BELOW

The matter came on for trial on November 29, 1979. Summary Judgment was granted at the closing of evidence as to defendant's liability. Damages were returned by the jury in the amount of $1,000 general damages, medicals in the sum of $688 and minimal loss of earnings in the amount of $100. Subsequently, plaintiff-appellant's Motion for Additur or New Trial Based on Inadequate Damages was denied by the trial court.

RELIEF SOUGHT

Plaintiff-appellant seeks an order requiring a new trial on which plaintiff-appellant's damages may be awarded as established by the evidence, unless defendant-respondent agrees to additur in an amount found by this court.

STATEMENT OF FACTS

The issues of liability were sufficiently clear that the court directed a verdict in favor of plaintiff at the conclusion of evidence.

During the afternoon of December 7, 1977, plaintiff-appellant was driving south on Redwood Road approaching other

southbound traffic stopped for a light at 35th South. She stopped without incident. Traveling behind her, defendant-respondent failed to react to her stopping, applied his brakes belatedly and struck the rear of her car with his pick-up truck. She was knocked unconscious, came to, and passed out again. (Tr. P6, L6-20- P9, L14-24) She was taken by ambulance to the Valley West Hospital where she was later released that day. (Tr. P10, L24-P11, L2)

Subsequent to the accident, she received medical treatment for injuries arising from the accident from her family physician, Dr. Isaacson, until he left private practice, and then from an orthopedic specialist, Dr. Thomas Soderberg. She has also received physical therapy from Larry Brown, R.P.T., and therapy from a chiropractor, Dr. Jean Wayman.

After the accident, she continued to work through December and January, and then upon advice of her doctor, and the work related pain, and inability to do her work safely, she left her employment to convalesce. (Tr. P29, L5-P31, L10) She was out of work from January 13, 1978, through May 20, 1978. Since the date of the accident, she has been unable to maintain a job as a driver, a skill she is proud of, a skill that has paid her more than other jobs she has maintained. Her experience included stockcar racing and truck driving. She can build an engine. (Tr. P34, L14-22)

Her wage losses were approximately $800 for 15 weeks lost at $3.55 an hour (Tr. P28, L26) at approximately 110 hours every four weeks. (Tr. P27, L11).

There was no contradicting testimony to appellant's evidence concerning her injuries.

Appellant described as extreme the pain she felt immediately following the impact (Tr. P9, L15-P10, L23). This was the only point of contradiction, defendant testifying that she didn't seem to be in trouble at the accident scene.

She also testified that she had to give up the employment she then had as a bus driver because operating the bus put her in pain and, even worse, limitation in moving her head to see other traffic caused her to scrape the bus twice against other cars. She gave up that job voluntarily after the second accident. (Tr. P31, L4-10) At time of trial, she had become self-employed, with her husband, painting signs. She had pain doing many of the mechanical requirements of this, and was substantially limited in her ability to work for continuous periods as the pain progressed with certain kinds of activities. (Tr. P40, L1-P41, L17) Finally, she described the pain she felt at time of trial as being repeated headaches, pain caused by activities involving bending her neck, and painful difficulty in such simple activities as opening jars and dressing herself. (Tr. P41, L13-P42,L4).

ARGUMENT

POINT I.

THE UTAH SUPREME COURT CAN DIRECTLY REACH THE HEART OF RULE 59, UTAH RULES OF CIVIL PROCEDURE, AND ORDER ADDITUR WHEN APPROPRIATE.

The pertinent points of Rule 59 are as follows:

> "A. Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes:
>
> "(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice and,
>
> "(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law."

Can the Utah Supreme Court directly address the issue of a jury verdict which inadequately compensates a plaintiff? In Bodon v. Suhrmann, 8 U2d 42, 327 P2d 826, at 2d 47, the Court answered:

> "Nevertheless, when the verdict is outside the limits of any reasonable appraisal of damages as shown by the evidence, it should not be permitted to stand, and if the trial court fails to rectify it, we are obliged to make the correction on appeal."

There the plaintiff was awarded the "munificent" sum of what added up to $31 for two weeks illness from eating sausage negligently prepared by the defendant Suhrmann. The Supreme Court ordered additur.

Where does the court derive such power?

> "In such instances, the courts exercise their inherent supervisory powers over jury verdicts, which derive from their duty to see that justice is done; and

make corrective orders necessary for that purpose. This is done by the trial court, or upon its failure to do so, by this court on appeal." id. U2d 45.

In accord see King v. Union Pac. R. Co., 117 U 40, 12 P2d 692 and Brown v. Johnson, 24 U2d 388, 472 P2d 942.

Appellant's medical testimony was given by a specialist in orthopedics. He testified that she would have a permanent 10% degree of disability resulting solely, proximately and directly from the subject accident. The disability would be inherently painful. In fact, he testified that the presence of pain as appellant attempted to move would be the primary factor in limiting her freedom of movement. Appellant has sustained pain ever since the accident occurred caused by the accident. (Tr. P29, L6-P107, L26)

Notwithstanding this evidence, the jury awarded $1,000 in general damages. Such an award could not cover to a small degree pain to date of trial. It would not at all begin to cover an award for a permanent and painful disability for appellant's 30 year life expectancy. Clearly, the jury verdict does not relate to this evidence. It had to reject it and substitute its own conclusion that plaintiff wasn't injured to any real degree past or future. Is the law and evidence such that the verdict should stand?

POINT II.

THE CRITERIA FOR SETTING ASIDE JURY VERDICTS JUSTIFY ADDITUR OR NEW TRIAL.

Evidence cannot be precisely measured and jurors are bound to have disparate views of the same evidence as noted by Justice Crockett in his concurrence in Holmes v. Nelson, 7 U2d at 435,

326 P2d 722.

But there the main opinion viewed the evidence and held:

> "We are of the opinion that this accident never should have happened; it was preventable. A careful review of the evidence leads us to the conclusion that defendant either did not see this child when he said he did, or was not going as slowly as he claims he was, or that he failed to do everything possible to avoid striking plaintiff by bringing his car to a stop as soon as possible or by turning to the right." id. U2d 438.

Therefore, the court could say that:

> "Here we are not confronted with evidence that is equally convincing in its weight. In this case, the demand of Rule 59(a) is fully satisfied--the evidence is insufficient to sustain the verdict."

Jury verdict was then reversed.

The Utah Supreme Court identified the elements to be considered in modifying a verdict as a matter of law in Jensen v. D & RG Ry Co, 44 U 100, 138 P 1185. There, in addressing the trial court's obligations at post trial motions, the court stated that the verdict should be corrected where it was "clear that the jury has misapplied or failed to take into account proven facts, or has made findings clearly against the weight of the evidence, so that the verdict is offensive to his sense of justice to the extent he cannot permit it in conscience to stand."

Jensen dealt with a jury verdict both in areas of liability and damages.

Looking at cases on damages, in Paul v. Kirkendall, 1 U2d 1, 261 P2d 670, this court reaffirmed its position saying:

"If inadequacy or excessiveness of the verdict ... shows a disregard ... of the evidence or the instructions ... such as to satisfy the court that the verdict was rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court may exercise its discretion in the interest of justice and grant a new trial."

Also in accord is Saltas v. Affleck, 99 U 381, 105 P2d 176, wherein a jury award of $800 for the death of plaintiff's son was increased by additur to $2,400.

POINT III.

THE CRITERIA FOR SETTING ASIDE JURY VERDICT DEMAND ACTION IN THIS CASE BASED UPON THE EVIDENCE.

Appellant does not hide from the fact that appellate courts are reluctant to overturn decisions based upon the findings of a trier of fact. In this case, what other facts are there on damages? None. To find that the evidence supporting her case is not credible is to find that she is not credible, her son is not credible, and Dr. Thomas E. Soderberg is not credible.

Defendant made no effort to bring any doctor, neighbor or investigator to limit, rebut or impeach a word of their testimony.

In some cases, no rebuttal is necessary, claims fall of their own weight for various reasons such as impeachment, absurdity and so on, but here no factual reasons are in the record, nor credibly implied from it.

The verdict is simply contrary to the evidence and, as such, denies appellant the "fair and adequate" compensation wrongdoers are required to pay their victims, and should be reversed.

CONCLUSION

There is not an issue of liability. There is not an issue of causal relation of damages. For such as they are, they were awarded by the jury. This issue is simply whether the amount of damages awarded by the jury is in accordance with the evidence. Plaintiff-appellant maintains that an award of $1,000 for damages in which she has already suffered pain for two years preceding the trial and from all the medical evidence at trial, will suffer pain in the future, is such a "munificent" sum as to require this court to fulfill the duty neglected by the trial court. There should be either additure or a new trial. Rule 59 and its interpretive cases require it.

DATED May 8, 1980.

JAMES E. HAWKES

MAILING CERTIFICATE

Mailed 3 copies of the foregoing Appellant's Brief to Frank N. Karras, attorney for defendant-respondent, 321 South 600 East, Salt Lake City, Utah 84102, May 8, 1980.

Hazel Sykes